

**EUROPEAN COMMUNITIES - REGIME FOR THE
 IMPORTATION, SALE AND DISTRIBUTION OF
 BANANAS**

**- RECOURSE TO ARBITRATION BY THE EUROPEAN
 COMMUNITIES UNDER ARTICLE 22.6 OF THE DSU -**

DECISION BY THE ARBITRATORS

WT/DS27/ARB/ECU

*Circulated to the Members on
 24 March 2000*

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I. PROCEDURAL BACKGROUND

A. *Ecuador's Request for Authorization of Suspension of Concessions or Other Obligations Pursuant to Article 22.2 of the DSU*

1. On 8 November 1999, Ecuador requested authorization by the DSB to suspend concessions or other obligations under the TRIPS Agreement, the GATS and GATT 1994 in an amount of US\$450 million.¹

2. With respect to the withdrawal of concessions in the goods sector, Ecuador submitted that such suspension is at present not practicable or effective, and that the circumstances are serious enough to request authorization to suspend concessions and other obligations under the GATS and the TRIPS Agreement.

3. As regards trade in services, Ecuador proposed to suspend the following subsector in its GATS Schedule of specific commitments:

¹ WTO document WT/DS27/52, dated 9 November 1999.

B. Wholesale Trade Services (CPC 622)

4. As regards intellectual property rights, Ecuador specified that its request concerned the following categories set out in Part II of the TRIPS Agreement:

Section 1: Copyright and related rights, Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations";

Section 3: Geographical indications;

Section 4: Industrial designs.

5. At the same time, Ecuador noted in its request under Article 22.2 that it reserved the right to suspend tariff concessions or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner.

6. Ecuador intends to apply the suspension of concessions or other obligations, if authorized by the DSB, against 13 of the EC member States.²

B. *The European Communities' Request for Arbitration Pursuant to Article 22.6 of the DSU*

7. On 19 November 1999, the European Communities requested arbitration pursuant to Article 22.6 of the DSU.³ The relevant part of that provision reads:

"... However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. ..."

8. The European Communities considered (i) that the amount of suspension of concessions or other obligations requested by Ecuador is excessive since it has

² According to Ecuador's request, the Netherlands and Denmark would be exempted.

³ The relevant parts of the EC Request under Article 22.6 of the DSU read:

"Pursuant to Article 22.6 of the Dispute Settlement Understanding, the European Communities object to the level of suspension of concessions or other obligations requested by Ecuador on 9 November 1999 in document WT/DS27/52. The European Communities consider that the request by Ecuador does not correspond, and by far, to the level of nullification and impairment of benefits presently suffered by Ecuador as a result of the failure of the European Communities to implement the recommendations and rulings of the Dispute Settlement Body in the procedure "European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador". In accordance with the provisions of Article 22.7 of the Dispute Settlement Understanding, the European Communities request, therefore, that this matter be submitted to arbitration. Moreover, the European Communities considered that Ecuador has not complied at all with the provisions under Article 22.3 of the Dispute Settlement Understanding. Therefore, the European Communities further request that this matter be also submitted to arbitration."

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suffered by far less nullification or impairment than alleged; and (ii) that Ecuador has not followed the principles and procedures set forth in Article 22.3 of the DSU in suspending concessions or other obligation across sectors and agreements.

9. At its meeting on 19 November 1999, the DSB referred the matters to arbitration in accordance with Article 22.6 of the DSU.

10. The Arbitrators are the members of the original panel:

Chairman: Stuart Harbinson
Members: Kym Anderson
Christian Häberli

II. THE JURISDICTION OF ARBITRATORS UNDER ARTICLE 22 OF THE DSU

11. Before addressing the procedural and substantive issues raised by the parties, we recall the powers of Arbitrators under paragraphs 6 and 7 of Article 22 of the DSU. The relevant parts of these provisions read:

"The arbitrator[s] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. ... However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator[s] shall examine that claim. In the event that the arbitrator[s] determine that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. ..."

Accordingly, the jurisdiction of the Arbitrators includes the power to determine (i) whether the level of suspension of concessions or other obligations requested is *equivalent* to the level of nullification or impairment; and (ii) whether the principles or procedures concerning the suspension of concessions or other obligations across sectors and/or agreements pursuant to Article 22.3 of the DSU have been followed.

12. In this respect, we note that, if we were to find the proposed amount of US\$450 million not to be equivalent, we would have to estimate the level of suspension we consider to be equivalent to the nullification or impairment suffered by Ecuador. This approach is consistent with Article 22.7 of the DSU which emphasizes the finality of the arbitrators' decision:

"... The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision

of the arbitrator, unless the DSB decides by consensus to reject the request."

13. We recall that this approach was followed in the US/EC arbitration proceeding in *EC - Bananas III*⁴ and the arbitration proceedings in *EC - Hormones*,⁵ where the arbitrators did not consider the proposed amount of suspension as equivalent to the nullification or impairment suffered and recalculated that amount in order to be able to render a final decision.

14. Regarding the question which "measures" and "DSB rulings" are relevant for assessing the level of nullification or impairment in this case, we note that both parties agree that the basis for the assessment of the level of nullification or impairment is the revised EC banana regime as contained in EC Regulations 1637/98 and 2362/98 which entered into force on 1 January 1999. According to the report of the original panel reconvened, pursuant to Article 21.5 of the DSU, upon request by Ecuador,⁶ and adopted by the DSB on 6 May 1999, the revised EC banana regime was found to be inconsistent with Articles I and XIII of GATT and Articles II and XVII of GATS.

III. PROCEDURAL ISSUES

A. *Ecuador's Request under Article 22.2 of the DSU and its Document on the Methodology Used for Calculating the Level of Nullification and Impairment*

15. The European Communities alleged that Ecuador's request under Article 22.2 of the DSU and the document of 6 January 2000 describing its methodology for calculating the amount of retaliation requested were not detailed enough, especially when compared to the US methodology paper in the previous arbitration proceeding. Ecuador stated, however, explicitly in the methodology document that a more detailed explanation would follow in its first submission.

⁴ Decision by the Arbitrators in *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* ("EC – Bananas III (US) (Article 22.6 – EC)"), (WT/DS27/ARB, dated 9 April 1999), DSR 1999:II, 725, paras. 2.10 ff.

⁵ Decision by the Arbitrators in *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by the United States - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* ("EC – Hormones (US) (Article 22.6 – EC)"), (WT/DS26/ARB, dated 12 July 1999), DSR 1999:III, 1105, para. 12. Decision by the Arbitrators in *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by Canada - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (WT/DS48/ARB, dated 12 July 1999), DSR 1999:III, 1135, para. 12.

⁶ Panel Report by the Reconvened Panel on *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/RW/ECU dated 12 April 1999), DSR 1999:II, 803, adopted on 6 May 1999.

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16. Upon receipt of Ecuador's first submission, the European Communities protested in a letter, dated 14 January 2000, that Ecuador had withheld substantial factual elements from the document on methodology and requested the Arbitrators to discard the additional information contained therein.

17. Ecuador contended, in a letter dated 17 January 2000, that it had met several times with the European Communities to discuss the nature of its claims and the methodology used to estimate the harm caused to it by the EC banana regime. It emphasized that it had not had access to the methodology document submitted by the United States in the *US/EC Bananas III* arbitration proceeding and that this document could not in any case represent a recognized standard for such a methodology document which is not provided for in the DSU. Ecuador also pointed out that the European Communities criticised the methodology document only eight days after its filing. Furthermore, the data contained in Ecuador's first submission derives from publicly available sources.

18. On 19 January 2000, the Arbitrators communicated the following letter to the parties:

"With reference to your letter dated 14 January 2000, in which you request that the Arbitrators make a preliminary ruling, deciding that all the information concerning the methodology (i.e. paras. 17-28 of Ecuador's submission and Exhibits F and G) submitted after 6 January 2000, be considered inadmissible and, therefore, discarded by the Arbitrators.

The Arbitrators, noting that Article 22.7 of the DSU provides that "the parties shall accept the arbitrator's decision as final and shall not seek a second arbitration", are of the opinion that it is inappropriate to give a ruling on the admissibility or relevance of certain information at this early stage of the proceeding. It may also be noted that in past arbitration cases, arbitrators have developed their own methodology for calculating the level of nullification or impairment as appropriate and have requested additional information from the parties until they were in a position to make a final ruling.

However, the Arbitrators have decided, in light of the concerns regarding due process, to extend the deadline for the submission of rebuttals for both parties to Tuesday, 25 January, 5 p.m. This should give both parties adequate time to respond to the factual information and legal arguments submitted by the other party."

19. We wish to supplement our reasoning for the approach taken in that letter with the considerations set out in the following paragraphs 20-36.

20. The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests,⁷ apply *mutatis mutandis* to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for a referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2.⁸ First, they give notice to the other party and enable it to respond to the request for suspension or the request for arbitration, respectively. Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party. Likewise, a request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators. Accordingly, we consider that the specificity standards, which are well-established in WTO jurisprudence under Article 6.2, are relevant for requests for authorization of suspension under Article 22.2, and for requests for referral of such matter to arbitration under Article 22.6, as the case may be. They do, however, not apply to the document submitted during an arbitration proceeding, setting out the methodology used for the calculation of the level of nullification or impairment.

21. In respect of a request under Article 22.2, we share the view of the arbitrators in the *Hormones* arbitration proceedings who described the minimum requirements attached to a request for the suspension of concessions or other obligations in the following way:

"(1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO-inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3."⁹

22. As to the first minimum requirement, Ecuador's request for suspension under Article 22.2 of the DSU, dated 8 November 1999,¹⁰ sets out the specific

⁷ The relevant part of Article 6.2 of the DSU reads: "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. ...".

⁸ "A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective - they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute." Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997 (WT/DS22/AB/R), p. 22.

⁹ "The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc...., the better. Such precision can only be encouraged in pursuit of the DSU objectives of 'providing security and predictability to the multilateral trading system' (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that 'all Members will engage in DSU procedures in good faith and in an effort to resolve the dispute'".

¹⁰ WT/DS27/52.

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amount of US\$450 million as the level of proposed suspension of concessions or other obligations.

23. In the methodology paper and submissions, Ecuador submitted that the direct and indirect harm and macro-economic repercussions for its entire economy amount to altogether US\$ 1 billion. While Ecuador stated that it does not intend to increase its initial request for suspension, it argued that the total economic impact of the EC banana regime should be taken into account by the Arbitrators by applying a multiplier when calculating the level of nullification and impairment suffered by Ecuador. In this respect, Ecuador makes reference to Article 21.8 of the DSU.¹¹

24. In the light of our considerations above concerning specificity requirements that apply with respect to Article 22, we believe that the level of suspension specified in Ecuador's request under Article 22.2 is the relevant one and defines the amount of requested suspension for purposes of this arbitration proceeding. Additional estimates advanced by Ecuador in its methodology document and submissions were not addressed to the DSB and thus cannot form part of the DSB's referral of the matter to arbitration. Belated supplementary requests and arguments concerning additional amounts of alleged nullification or impairment are, in our view, not compatible with the minimum specificity requirements for such a request¹² because they were not included in Ecuador's request for suspension under Article 22.2 of the DSB.

25. As to the second minimum requirement referred to above, we recall which sectors and agreements Ecuador lists in its request under Article 22.2 as those under which it intends to suspend concessions or other obligations. Under the GATS, it specifies the service subsector of "wholesale trade services (CPC 622)". Under the TRIPS Agreement, Ecuador requests suspension, pursuant to Article 22.3(c), of Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations" in Section 1 (Copyright and related rights), Section 3 (Geographical indications) and Section 4 (Industrial designs).

26. We determine that these requests by Ecuador under the GATS and the TRIPS Agreement fulfil the minimum requirement to specify the agreement(s) and sector(s) with respect to which it requests authorization to suspend concessions or other obligations.

¹¹ Article 21.8 of the DSU: "If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned."

¹² We also note that it may well be that a Member chooses to request suspension only for a part of the nullification or impairment suffered from WTO-inconsistent measures taken by another Member. We will address below the question of total economic impact as opposed to nullification and impairment of trade in goods and services in our discussion concerning subparagraph (d) of Article 22.3.

27. In its request under Article 22.2, Ecuador notes in addition that it "reserves the right to suspend tariff concession or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner."

28. Regarding this last statement we would like to make the following remarks. We recall our considerations that the specificity requirements of Article 6.2 are relevant for requests under Article 22.2. According to well-established dispute settlement practice under Article 6.2 of the DSU,¹³ panels and the Appellate Body have consistently ruled that a measure challenged by a complaining party cannot be regarded to be within the terms of reference of a panel unless it is clearly identified in the request for the establishment of a panel. In past disputes concerning Article 6.2, where a complaining party intended to leave the possibility open to supplement at a later point in time the initial list of measures contained in its panel request (e.g. with the words "including, but not limited to measures listed" specifically in the panel request), the terms of reference of the panel were found to be limited to the measures specifically identified.

29. Based on an application of these specificity standards to requests under Article 22.2, we consider that the terms of reference of arbitrators, acting pursuant to Article 22.6, are limited to those sector(s) and/or agreement(s) with respect to which suspension is specifically being requested from the DSB. We thus consider Ecuador's statement that it "reserves the right" to suspend concessions under the GATT as not compatible with the minimum requirements for requests under Article 22.2. Therefore, we conclude that our terms of reference in this arbitration proceeding include only Ecuador's requests for authorization of suspension of concessions or other obligations with respect to those specific sectors under the GATS and the TRIPS Agreement that were unconditionally listed in its request under Article 22.2.

30. Even if Ecuador's "reservation" of a request for suspension under the GATT were permissible, there would be a certain degree of inconsistency between making a request under Article 22.3(c) - implying that suspension is not practicable or effective within the same sector under the same agreement or under another agreement - and simultaneously making a request under Article 22.3(a) - which implies that suspension is practicable and effective under the same sector. In this respect, we note that, although Ecuador did not in fact make both requests

¹³ Appellate Body Report on *European Communities - Customs Classification on Certain Computer Equipment*, adopted on 26 June 1998 (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R), DSR 1998:V, 1851, paras. 64-73. Appellate Body Report on *EC - Bananas III*, adopted on 25 September 1997 (WT/DS27/AB/R), DSR 1997:II, 591, paras. 141-143. Appellate Body Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted on 12 January 2000 (WT/DS98/AB/R), DSR 2000:I, 3, paras. 114-131, citing previous reports concerning the interpretation of Article 6.2. Panel Report on *Japan - Measures Affecting Consumer Photographic Film and Paper*, adopted on 22 April 1998, DSR 1998:IV, 1179, (WT/DS44/R), paras. 10.8-10.10, 10.15-10.19. Appellate Body Report on *Australia - Measures Affecting Importation of Salmon*, adopted on 6 November 1998 (WT/DS18/AB/R), DSR 1998:VIII, 3327, paras. 90-105.

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at the very same point in time, if it were likely that the suspension of concessions under the GATT could be applied in a practicable and effective manner, doubt would be cast on Ecuador's assertion that at present only suspension of obligations under other sectors and/or other agreements within the meaning of Article 22.3(b-c) is practicable or effective in the case before us.

31. In other words, we fail to see how it could be possible to suspend concessions or other obligations for a particular amount of nullification or impairment under the same sector as that where a violation was found (which implies that this *is* practicable and effective) and simultaneously for the same amount in another sector or under a different agreement (which implies that suspension under the same sector¹⁴ - or under a different sector under the same agreement - *is not* practicable or effective). But we do not exclude the possibility that, once a certain amount of nullification or impairment has been determined by the Arbitrators, suspension may be practicable and effective under the same sector(s) where a violation has been found only for part of that amount and that for the rest of this amount of suspension is practicable or effective only in (an)other sector(s) under the same agreement or even only under another agreement.

32. However, we do not exclude the possibility that the circumstances which are relevant for purposes of considering the principles and procedures set forth in Article 22.3 may change over time, especially if the WTO-inconsistencies of the revised EC banana regime are not removed and the suspension of concessions or other obligations should, as a result, remain in force for a longer period. But we do not believe that changes with respect to trade sectors or agreements affected by such suspension could be implemented consistently with Article 22 of the DSU in the absence of a specific authorization by the DSB and, if challenged, a further review by arbitrators acting pursuant to Article 22.6.

33. In this context, we further recall the general principle set forth in Article 22.3(a) that suspension of concessions or other obligations should be sought first with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. Given this principle, it remains the preferred option under Article 22.3 for Ecuador to request suspension of concessions under the GATT as one of the same agreements where a violation was found, if it considers that such suspension could be applied in a practicable and effective manner. At any rate, if we were to find in our review of Ecuador's considerations that it did not (entirely) follow the principles and procedures of Article 22.3 in making its request under Article 22.2, or that the requested level of suspension exceeds the level of nullification or impairment suffered, Ecuador would be required to make another request for authorization by the DSB for suspension of concessions or other obligations under Article 22.7. This new request could include, *inter alia*, suspension of concessions under the

¹⁴ We note that within a sector, suspension may be possible with respect to certain types of products, while it is not practicable or effective with respect to other categories of products.